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SUPREME COURT, U.S.

No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

JOY OIL COMPANY, LTD.,
a Canadian corporation,
Plaintiff and Petitioner,
vs.
STATE TAX COMMISSION,
Defendant and Respondent.

(Companion case to No. 224, Charles E. Austin, Inc., v. Secretary of State, 321 Mich. 426.)

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I.

OPINION OF THE COURT BELOW

The opinion of the court below is officially reported as *Joy Oil Company, Ltd.* v. *State Tax Commission*, 321 Mich. 335.

II.

COUNTER-STATEMENT ON JURISDICTION

The petitioner invokes the jurisdiction of this court under Sectoin 237 of the Judicial Code, as amended, (Title 28 U.S.C.A. Sec. 344 (a), 861 (a), 8 FCA, Title 28, Sec. 344 (a)) in which the peitioner claims that the judgment sought to be reviewed is a final judgment; that application for writ of certiorari is made within the time limit prescribed by the rules of this court and that the issue presents a Federal question in that an ad valorem tax is assessed on gasoline in storage within the State of Michigan, and further claiming that the commodity is in foreign commerce by reason of export bills of lading having been issued at the time of purchase marked "For export to Canada" (23, 24); that the gasoline after coming to rest in the City of Dearborn (taxing unit) was to be shipped to Canada by boat, petitioner claiming the transaction to be exempt from taxation on the ground of being in foreign commerce.

It is the position of the defendant and respondent that:

(1) The Michigan Supreme Court did not decide a Federal question, substantial or otherwise, in that.

(a) The gasoline was shipped between points within the State of Michigan in an intrastate shipment, whereby the gasoline did not leave the State

of Michigan from the time of purchase by the petitioner until the receipt of the gasoline by the petitioner in its sforage tanks owned by it in the City of Dearborn, and that the gasoline was held in storage for a period of fifteen months for the convenience of the shipper pending his determination of continuation of the shipment from Dearborn, Michigan, to Canada.

(b) The determination by the Supreme Court of the State of Michigan did not require the court to pass upon a Federal question; that no Federal question was determined as appears by the opinion of the court as stated at the outset:

> "The facts are not in dispute and, as hereinafter shown, control decision." (33)
>
> Note 49, *Judicial Code*, Section 237.

(c) The gasoline did not become a commodity in foreign commerce until July, 1947, at which time it was transported by the petitioner to its final place of destination in Canada; that the determination of this fact by the lower court does not make it appear that the United States Supreme Court would have jurisdiction as there is no Federal question presented for decision which was necessary to the determination of the cause and that there was no Federal question actually decided. The judgment was rendered without deciding a Federal question.

> Note 49, *Judicial Code*, Section 237, and cases therein cited.

(d) The determination of the questions of fact in this case is exclusively within the province of the Michigan Supreme Court.

(2) If a Federal question could be said to have been involved, such question was decided fully in accord with the decisions of the United States Supreme Court involving the import-export clause of the United States Constition and the cases relied upon by petitioner namely:

Carson Petroleum Company v. *Vial*, 279 U.S. 95, 73 L. Ed. 626;
Richfield Oil Corporation v. *State Board of Equalization*, 329 U. S. 69, 91 L. Ed. 80;
A. G. Spaulding & Bros. v. *William H. Edwards, Collector of Internal Revenue*, 262 U. S. 67, 67 L. Ed. 865.

In the instant case the facts clearly show that the storage of the gasoline in the storage tanks within the City of Dearborn was for the convenience of the owner. During a period of more than fifteen months no act was instituted by the shipper, petitioner, to continue the movement or shipment of the gasoline in furtherance of the claimed foreign commerce movement. The facts show to the contrary, that there had been a stoppage in transit for the sole convenience of the shipper for the sole purpose of obtaining a convenient means of transportation.

III.

COUNTER-STATEMENT OF FACTS

Since the function of this Court

> ". . . is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, . . . nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court," (Waters-Pierce Oil Co. v. State of Texas, 212 U. S. 86, at p. 97).

we cannot accept the "Brief Statement of Facts" as set forth in plaintiff's petition for writ of certiorari. Respondent, therefore, sets forth the following statement of the case, based upon findings of fact of the Michigan Supreme Court in *Joy Oil Company, Ltd.* v. *State Tax Commission,* 321 Mich. 335 (33 through 42 inclusive) and in particularly as follows: (33, 34, 35)

> "The question here for decision is whether a quantity of gasoline stored in tanks in the City of Dearborn pending transshipment to Canada is liable for an ad valorem tax. The facts are not in dispute and, as hereinafter shown, control decision.
>
> "On December 29, 1945, the appellant Joy Oil Company, Ltd., a Canadian corporation not author-

ized to do business in Michigan, purchased 1,500,000 gallons of gasoline from the Mid-West Refineries, shipped it by rail from Grandville and Alma to itself as consignee, at Detroit, and stored it in large storage tanks in Dearborn pending transshipment to Canada. The bills of lading from the Pere Marquette railroad were each marked 'For export to Canada.' However, the bills of lading were not through bills from Grandville and Alma to Toronto, Canada, but the shipments were consigned to appellant at Detroit, the place of delivery being within a few feet of the boundary line between Detroit and Dearborn, and the storage tanks being near the railroad siding but over the line in Dearborn. All of the bills of lading were issued in January, 1946, the shipments were made beginning in January and accumulated until some time in February when the final delivery was made to appellant at said storage tanks leased by it located in the City of Dearborn.

"On April 1, 1947, all of the above gasoline was in said tanks with the exception of a small amount which had previously been exported to Canada by truck over the Ambassador bridge. Further movement of gasoline across said bridge was stopped by the authorities and there was a delay of about 18 months before said gasoline in storage was transported to Canada. Commencing in July, 1947, the gasoline was transported to Canada by boat.

"On April 1, 1947, the city of Dearborn assessed said gasoline for ad valorem taxes, and the tax now amounts to $1,825.93. Appellant appealed from said assessment to the board of review of the city of Dearborn, which sustained the tax; whereupon appellant appealed to the Michigan State tax com-

mission, where the tax was again upheld. On leave granted Joy Oil Company, Ltd., now prosecutes an appeal to this Court in the nature of certiorari from said decision of the State tax commission.

"It is the claim of the appellant that the gasoline in question was a commodity in foreign commerce, and that the City of Dearborn is precluded from imposing the tax under the export-import clause of the United States Constitution.

"Summarizing the factual situation, said gasoline was shipped intrastate by rail to appellant in Dearborn, stored there about 18 months in leased tanks, then transshipped by boat to Canada, and on April 1, 1947, after the gasoline had been stored in Dearborn about 15 months the city assessed it for ad valorem taxes. Was it exempt, as a commodity in foreign commerce?"

In the case of *Independent Warehouses, Inc.* v. *Scheele*, 331 U. S. 70, 91 L. Ed. 1946, Mr. Justice Rutledge, in delivering the opinion of this Court stated in reference to a determination of fact by the lower court:

"Those rulings are conclusive upon us."

IV.

ARGUMENT

It is the position of the defendant and respondent that the petition for writ of certiorari should be denied for the following reasons:

1. Plaintiff and petitioner fails to show in the petition for writ of certiorari that this Court has jurisdiction as required by Judicial Code, Section 237, Title 28, Section 344, Note 49, and the cases therein cited, and especially *Warren W. Wilson, et. al.*, appellants v. *Otho A. Cook*, Commissioner of Revenues, 327 U. S. 474,498; 90 L. Ed. 793. Mr. Chief Justice Stone delivered the opinion of this Court and stated, 90 L. Ed. 799, as follows:

> "Under Section 237 of the Judicial Code we are without jurisdiction . . . unless there was 'drawn in question' before the Supreme Court . . . 'the validity of a statute' of the state, 'on the ground of its being repugnant to the Constitution, . . . or laws of the United States.' The purpose of this requirement is to restrict our mandatory jurisdiction on appeal (citing cases), and to make certain that no judgment of a state court will be reviewed on appeal by this Court unless the highest court of the state has first been apprised that a state statute is being assailed as invalid on federal grounds (citing cases), or, when the statute, as applied, is so assailed, until it has opportunity authoritatively to construe it (citing cases). This jurisdictional requirement is satisfied only if the record shows that

the question of the validity under federal law of the state statute, as construed and applied, has either been presented for decision to the highest court of the state (citing cases), or has in fact been decided by it (citing cases), and that its decision was necessary to the judgment.

* * *

"As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States (citing cases). That court's opinion, while holding that the 'tax law' was applicable to 'persons severing timber from lands of the United States in the national forest,' does not indicate that plaintiffs raised there, or that the court passed upon, the validity of the statute as applied. The court considered only the validity of 'the tax', not that of the statute.

"In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack, as here, the tax levied under the statute, or 'the right to collect the tax' which has been levied, or show that the validity of the tax alone has been considered. (citing cases). For 'the mere objection to an exercise of authority under a statute whose validity is not attacked, cannot be made the basis' of an appeal (citing cases). It is for this reason that we have held that an appeal will not be sustained where there has been only an attack

upon a tax assessment (citing cases), or, as here, upon a 'tax' (citing cases), or upon the attempt to collect a tax (citing a case).

"Since plaintiffs' attack is directed to the validity of the tax as laid, and not to the validity of the statute, as applied, we are without jurisdiction of their appeal under Section 237 of the Judicial Code, 28 USCA Section 344, 8 FCA title 28, Section 344. Treating the appeal as a petition for writ of certiorari, as required by Section 237 (c) of the Judicial Code, we grant certiorari, as we did in No. 329. We can consider only the federal questions passed upon by the state Supreme Court."

2. There is no Federal question of substance decided by the lower court. As has been pointed out, the lower court in determining this case decided the question of fact involved, i.e., that the commodity was not in foreign commerce and was not exempt from taxation based upon the facts presented concerning continuity of transit or shipment and that such determination of fact was the controlling determinative issue and did not involve determination of a Federal question, the Federal Constitution, the Constitution of the State of Michigan, the import-export clause or the commerce clause as claimed by the petitioner, and that there was not "drawn in question" the validity of a statute of the state on the ground of its being repugnant to the constitution, treaties, or laws of the United States.

V.

CONCLUSION

It, therefore, appears that a Federal question of substance is not involved in this case, and therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

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EDMUND E. SHEPHERD, *Solicitor General of the State of Michigan,*

Dale H. Fillmore

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Brief by JOEL K. UNDERWOOD, *Deputy Corporation Counsel of the City of Dearborn.*

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Dated: August 26, 1948.